

No. 89-1416

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

AIR COURIER CONFERENCE OF AMERICA,
Petitioner,

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, and
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMERICAN POSTAL WORKERS UNION,
AFL-CIO, AND
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the respondent unions had standing to bring a civil action seeking judicial review of the final rule promulgated by the United States Postal Service suspending the Private Express Statutes so as to permit the practice of international remailing.

2. Whether the court of appeals correctly held that the Postal Service's final rule suspending the Private Express Statutes for international remailing pursuant to 39 U.S.C. § 601(b) was arbitrary and capricious because the Postal Service failed to consider the impact of the suspension on all postal patrons and failed to explain its reasons for rejecting several more narrowly defined suspension alternatives.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 891 F.2d 304 (D.C. Cir. 1989). Pet. App. 1a-18a. The district court's opinion is reported at 701 F. Supp. 880 (D.D.C. 1988). Pet. App. 28a-38a.

STATEMENT OF THE CASE¹

On August 20, 1986, defendant-appellee United States Postal Service ("Postal Service" or "USPS") published

¹ The petitioner, Air Courier Conference of America, intervened in the district court but did not participate in any part of the proceedings in the court of appeals. The petitioner filed a notice of

a final regulation suspending the Private Express Statutes, 18 U.S.C. §§ 1693-1699, 1729 (1982); 39 U.S.C. §§ 601-606 (1982) ("PES") which establish the postal monopoly, to permit a practice known as international remailing.² 39 C.F.R. § 320.8 (1986), Pet. App. 19a-26a, 51 Fed. Reg. 29,636. The new international remail regulation permitted for the first time private carriers to deliver mail originating in the United States directly to foreign postal systems, by-passing the Postal Service. On November 25, 1987, plaintiffs-appellants, American Postal Workers Union, AFL-CIO ("APWU") and National Association of Letter Carriers, AFL-CIO ("NALC") brought this action for declaratory and injunctive relief against the international remail regulation. APWU and NALC are national labor organizations representing more than 600,000 Postal Service employees whose employment opportunities would be adversely affected by the diversion of mail and revenue to private couriers that would be permitted by the regulation. The crux of the Unions' position was that the Postal Service had failed to develop an administrative record establishing that "the public interest requires" a suspension of the Private Express Statutes for international remail as mandated by 39 U.S.C. § 601(b).

The district court granted summary judgment in favor of the Postal Service, holding that the Unions lacked

appearance in the court of appeals on February 6, 1990, almost two months after the court entered its judgment. The petitioner asserts the right to seek certiorari as a "party" under Section 1254(1). The U.S. Postal Service did not petition for writ of certiorari.

² 39 C.F.R. § 320.8 provides in pertinent part:

(a) The operation of 39 U.S.C. § 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

standing to bring the action and, further, that the Postal Service had not acted arbitrarily and capriciously in suspending the Private Express Statutes. The court of appeals reversed the district court on both issues and remanded the case to the Postal Service for further development of the administrative record.

The PES generally reserve to the United States Postal Service a monopoly over the carriage of letters and packets. These statutes, origins of which date back at least to the Continental Congress, were enacted as a revenue protection measure for the Postal Service. 39 U.S.C. § 3623(d); *Regents of the University of California v. Public Employment Board*, 108 S.Ct. 1404, 1408, 1410 (1988). Under 39 U.S.C. § 601(b) the Postal Service may suspend the postal monopoly created by the Private Express Statutes only when "the public interest requires" the suspension. 39 U.S.C. § 601(b) (emphasis added). In determining whether the public interest requires such a suspension the service must follow the rule-making provisions of the Administrative Procedure Act. ("APA"). 5 U.S.C. § 101 *et seq.*; see 39 C.F.R. 310.7 (1975).

In October 1979, the Postal Service adopted a regulation pursuant to its authority under 39 U.S.C. § 601(b) suspending the operation of the Private Express Statutes for extremely urgent letters. 44 Fed. Reg. 61,181 (1979); 39 C.F.R. § 320.6 (1979). Sometime after the promulgation of the urgent letter suspension, private mail services began relying on the suspension to justify a business practice commonly known as "international remailing" in which private firms carry letters addressed to destinations outside the United States and deposit those letters in the mail stream of foreign postal administrations. Believing the practice to be illegal, the Postal Service asked the Department of Justice to enjoin the practice. When the Justice Department refused, the Postal Service initiated a rulemaking proceeding in October 1985 to modify the urgent letter suspension to con-

firm that the suspension did not cover the practice of international remailing. 50 Fed. Reg. 41,462-64 (1985), Ad. Rec. 1.

The proposed rule-making was opposed by remailers and other members of the business community. Their comments, however, revealed that much of what was sent through private remailers was non-urgent materials such as catalogues, other sales literature and newsletters. Many of the comments merely expressed a preference for having a choice of service or argued that the postal monopoly is inconsistent with a policy of free competition. Other comments focused primarily on the lower cost of private international remail.

In March 1986, the Postal Service abruptly changed its position on international remailing. The Chairman of the Postal Service's Board of Governors, John R. McKean, announced the initiation of a new rule-making proceeding to consider whether the public interest required the suspension of the Private Express Statutes to allow international remailing. McKean's announcement was part of a notice published on March 21, 1986 in the Federal Register withdrawing the October, 1985 proposed rule and announcing that a new rule-making proceeding would be initiated "as soon as a factual record is fully developed." 51 Fed. Reg. 9853 (1986), Ad. Rec. at 90.

The Postal Service never developed such a factual record. In both the June 17, 1986 notice of proposed rule-making and the notice published on August 20, 1986 announcing a final rule suspending the Private Express Statutes to permit unrestricted private international remailing, the Postal Service acknowledged the lack of factual information in the record. In its notice of proposed rule-making, the Postal Service emphasized the lack of evidence in the record citing the "anecdotal character" of tables charting relative delivery times, the "imprecision of the data" on the need for private international

remail, and the presence of "little or no reliable information as to the amount of revenues diverted to date by the activities of remailers." 51 Fed. Reg. 21,931 (June 17, 1986). As the court of appeals subsequently found:

the USPS had emphasized the sketchy nature of the factual record, referring to the 'anecdotal character' of tables charting relative delivery times, the 'imprecision of the data' on the need of U.S. businesses for private international remailing, and the presence of 'little or no reliable information as to the amount of revenues diverted to date by the activities of remailers.' 51 Fed. Reg. 21,931 (June 17, 1986).

Pet. App. 4a.

The NALC and the APWU filed suit in the district court challenging the international remail suspension. The district court granted the Postal Service's motion for summary judgment. The district court first found that the Unions lacked standing, even though they met the constitutional requirements for standing under Article III, because they were not within the "zone of interests" implicated by the PES. Pet. App. 32a. The district court also found that the regulation promulgated by the Postal Service was not in excess of statutory authority and was not arbitrary, capricious or an abuse of discretion in spite of the "relative dearth of empirical data" in the record. Pet. App. 35a.

In an opinion issued on December 8, 1989, the Court of Appeals for the District of Columbia Circuit reversed the district court on both standing and the merits and vacated summary judgment for the Postal Service. The court first found that the Unions clearly satisfied the "injury in fact" constitutional requirement for Article III standing based on the threatened injury of possible reduced employment opportunities for their members. The court also found that the Unions satisfied the "zone of interest" test for standing as enunciated by this Court in *Clarke v. Securities Industry Ass'n*, 107 S.Ct. 750, 757-759

(1987) (*Clarke*). With respect to the merits, the court of appeals found that the Postal Service did not consider the impact of the proposed suspension "on those consumers who would continue to use the Postal Service, both from a price and service perspective." Pet. App. 14a. Instead, the Postal Service considered only the "selective cost savings and service benefits" to businesses engaged in commerce overseas. Pet. App. 14a. The court concluded that this failure "to give sufficient attention to how revenue losses might affect cost and service of other postal patrons" was unreasonable, arbitrary and capricious in light of the fundamental purpose of the PES "to prevent private competitors from 'cream skimming' profitable routes, thereby providing the Postal Service with sufficient revenue to fulfill its mandate of providing service throughout the nation and at uniform rates." Pet. App. 14a-15a. The court also found that the Postal Service acted arbitrarily and capriciously by failing to explain its reasons for rejecting more narrowly defined suspension alternatives. Pet. App. 15a.

The court remanded the case to the district to vacate the grant of summary judgment and allow the agency to reopen its proceedings if it so desired.

REASONS THE WRIT SHOULD BE DENIED

1. The court below correctly applied the zone of interest test enunciated by this Court in *Clarke*, 107 S.Ct. at 750, and nothing in the court of appeals' analysis or application of the test suggests a need for any further clarification by this Court. The zone of interest test grants standing to challenge an agency action to any party "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Id.* at 756. Since Congress intended agency action to be "presumptively reviewable" the test denies standing only to those parties whose "interests are so marginally related to or inconsistent with the purposes implicit in the stat-

ute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 757.

The court below correctly found that the Unions' interest in ensuring a sufficient revenue base for the Postal Service in order to preserve employment opportunities for their members was more than "marginally" related to the purposes of the PES. In reaching these conclusions, the court quite properly did not view the PES in isolation. Rather, as required by *Clarke*, the court examined 39 U.S.C. § 601 in the context of the entire Postal Reorganization Act of 1970, 39 U.S.C. §§ 101-5605 ("PRA"), of which section 601 is a part. Recognizing that one of the principal purposes of the PRA was the improvement of wages and working conditions and the reform of postal labor relations, the court correctly found that "[t]he Unions' asserted interest is embraced directly by the labor reform provisions of the PRA." Pet. App. 8a. In addition, even if one focuses only on the revenue protective purposes of the PES, the court stated: "That postal workers benefit from the PES's function in ensuring a sufficient revenue base . . . is scarcely deniable." *Id.*

Given the generous test of standing in *Clarke*—specifically, this Court's teaching that, for an injured party to be deprived of standing under the "zone of interest" test, a court must find a congressional purpose to *preclude* judicial review by these plaintiffs (107 S.Ct. at 759)—the court of appeals was clearly correct in holding that the respondents had standing to challenge this regulation.

2. Contrary to the allegations of the petitioner (Pet. App. at 8-9), there is no conflict among the circuits on the issue of postal unions' standing to seek judicial review of a regulation suspending the PES. The cases cited—*National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America, Inc.*, 470

F.2d 265 (10th Cir. 1972); *American Postal Workers Union v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985); and *American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal System of America, Inc.*, 481 F.2d 90 (6th Cir.), cert. granted, 414 U.S. 1110 (1973), cert. dismissed, 415 U.S. 901 (1974)³—involved the very different question whether the postal unions have an implied private right of action under the PES against private couriers. This issue is resolved by the much more demanding test of whether Congress affirmatively intended to allow a direct civil action to enforce the statute in question. See *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 770 (1981); *Cort v. Ash*, 422 U.S. 66 (1975).

None of these cases cited by petitioner suggests that postal unions have no standing to seek judicial review of Postal Service regulations suspending the PES under the approach set out in *Clarke*.

3. The court of appeals' decision on the merits does not raise "an important issue of administrative law and procedure" as petitioner has claimed. The court simply reviewed the record relied on by the Postal Service and found that: 1) the Postal Service failed to consider seriously the impact of the proposed suspension on all Postal Service patrons; and 2) the Postal Service failed to explain why it rejected more narrowly defined suspension alternatives. Pet. App. 16a. In concluding that these omissions rendered the suspension arbitrary and capricious, the court relied upon the proposition that under 39 U.S.C. § 601 the Postal Service must consider the effect of revenue losses resulting from a proposed suspension on the overall mail-using public and the Postal Service's ability to fulfill its statutory mandate of uni-

³ In the *Detroit Local* case, this Court at first issued a writ of certiorari to resolve the circuit conflict on whether there exists a private right of action under the PES. The writ was dismissed on motion of the petitioner.

versal service at uniform rates. Since this proposition is manifestly correct, see *California Regents*, 108 S.Ct. at 1408 and 1410, the only real issue presented by this case is whether the court below correctly evaluated the administrative record. This limited question does not merit review by this Court.⁴

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

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⁴ The petitioners' disagreement with the policies underlying the postal monopoly as being contrary to free competition should be addressed to Congress, not to the Court.